IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT

JODHPUR

:J U D G M E N T:

LIYAKAT ALI VS. STATE OF RAJASTHAN

D.B. CRIMINAL APPEAL NO. 108/2001
against the judgment dated 27.1.2001 passed by the learned Additional Sessions Judge No.1, Bikaner in Sessions Case No.05/99 (State Vs. Liyakat Ali)

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DATE OF JUDGMENT :: 15th APRIL, 2006

PRESENT

HON'BLE MR. N.N. MATHUR, J.
HON'BLE MR. MANAK MOHTA, J.

Mr. Sandeep Mehta] for the appellant.
Mr. Vineet Jain]
Mr. V.R. Mehta, Public Prosecutor.

Reportable

BY THE COURT : (PER HON`BLE MANAK MOHTA, J.)

1. The instant appeal is directed against the judgment of conviction and sentence dated 27.1.2001 passed by learned Additional Sessions Judge No.1, Bikaner in Sessions case No.05/99 whereby the accused-appellant has been convicted for the offence under Section 302 I.P.C. and has been sentenced to imprisonment for life and to pay a fine of Rs.500/-, in default of payment of fine, to further undergo one month's additional imprisonment.

2. The prosecution case, as disclosed during trial, is that one Mashroor Ahmed (PW-1) lodged an oral report (Exhibit-P/1) on 22.12.1998 at 10:30 a.m., at P.S. Kotwali Bikaner to the effect that Dilavar Hussain is his father-in-law and he married with his elder daughter-Rukshana about four months ago. He further stated that Dilavar Hussain's wife and sons had gone to Ramgarh (Sikar) and Dilavar Hussain stayed with the complainant as he had a dispute with Sardar Ali-his sister's husband and his sons. Accused-Liyakat Ali is the 'navasha' (daughter's son) of Dilavar Hussain, who had come from Bhadra on 20.12.98 and also stayed at his house. On that day, the first informant came from duty late in the night at 12:00 p.m., and went to sleep. Next morning he saw Liyakat Ali, who is his sister's son. Liyakat Ali got married about one year ago with Sardar Ali's daughter. In the house alongwith the first informant, his brother-Nafish Ahmed, Islam, his father, his wife-Rukshana and his sister-Anjuman were also living. On 21.12.1998, in the night at about 12 'O clock he came from duty, woke up his wife and after taking food went to sleep. At about 12:30 a.m. in the intervening night 21/22.12.98, he heard noise of vomiting coming from the room of Dilavar Hussain, upon which he woke up and went to the room of Dilavar Hussain. Vomit-material was seen on the cot, blood was oozing out from Dilavar Hussain's ear and 6-7 injuries were present on his head near his ear. His 'Rajai' and 'Dari'

were found smeared with blood. Liyakat Ali was not there in the room at that point of time and blood was also seen on the 'Rajai' lying on Liyakat Ali's cot. The back-door of house was found open. Dilavar Hussain was taken to P.B.M. Hospital, Bikaner and was admitted there. He did not regain consciousness. The first informant further alleged that Liyakat Ali had launched attack on Dilavar Hussain with an intention to kill him.

3. On the basis of the aforesaid report, an FIR No.143/98 was registered under Section 307 I.P.C. and the investigation was commenced by the police. During investigation, police visited the site, prepared site-plan (Exhibit-P/2), haalat moka (Exhibit-P/3) etc. and seized pillow cover, 'rajai' cover stained with blood from the bed of Dilavar Hussain vide (Exhibit-P/6) and rajai' cover stained with blood from the bed of accused-Liyakat vide (Exhibit-P/7) and sealed them on the spot. On 23.12.98 Dilavar Hussain died in hospital. Thus, offence under Section 302 I.P.C. was substituted. Fard Surat Haal Lash (Exhibit-P/4) and Panchayatnama of the dead-body (Exhibit-P/5) were prepared and the post-mortem of dead-body was conducted vide (Exhibit-P/14). The underwear and banyan of deceased were collected and sealed (Exhibit-P/8). Statements of witnesses were recorded. During investigation, accused-Liyakat Ali was arrested vide arrest memo (Exhibit-P/12)

and as per his information given under Section 27 of Evidence Act (Exhibit-P/19) and at his instance an iron rod (used as axle in auto-taxi) was recovered vide (Exhibit-P/10).

4. After completion of investigation, charge-sheet was filed. Charge under Section 302 I.P.C. was read over to the accused-appellant, to which he pleaded not guilty and claimed trial.

5. The prosecution in support of its case examined as many as 14 witnesses, namely, PW-1 Mashroor Ahmed, PW-2 Nafish Ahmed, PW-3 Peer Kadir Ahmed, PW-4 Smt. Rukshana, PW-5 Smt. Anvari, PW-6 Hazi Mohd., PW-7 Roshan Ali, PW-8 Bandu Khan, PW-9 Salim Mohd., PW-10 Dr. P.N. Mathur, PW-11 Virendra Kumar, PW-12 Hari Singh, PW-13 Mohan Singh and PW-14 Kasi Ram and got exhibited certain documents as Exhibit-P/1 to Exhibit-P/21. The accused-appellant in his statement recorded under Section 313 Cr. P.C. denied the correctness of prosecution evidence appearing against him and stated that he is innocent. He further stated that complainant-Mashroor Ahmed's father Kadir Ahmed and Sardar Ali are real brothers. Sardar Ali and his sons and Kadir Ahmed etc., were having enmity with him and his family members, thus, he has been falsely roped in this case. He has further stated that on the day of occurrence he was at Bhadra. In defence the accused-

appellant examined Gulam Galani (DW-1). During trial he got exhibited police statement of Smt. Anwari (PW-5) as Exhibit-D/1. However, no other documentary evidence was produced.

6. After hearing the parties, the learned trial court found the prosecution case proved against the accused-appellant beyond all reasonable doubts, turned down the defence version and held him guilty for committing murder of Dilavar Hussain. The learned court convicted and sentenced the appellant as mentioned above vide judgment dated 27.1.2001. Hence, this appeal has been filed.

7. We have heard Mr. Sandeep Mehta, learned counsel for the appellant, learned Public Prosecutor for the State Mr. V.R. Mehta and have carefully gone through the record of the case.

8. During the course of arguments, learned counsel for the appellant submitted that the learned trial court has not properly considered and appreciated the material available on record and has given erroneous finding with regard to the guilt of accused-appellant, which deserves to be rejected. It was submitted that in this case there is no eye-witness of occurrence and the case is totally based on circumstantial evidence. It was urged that in cases of circumstantial evidence, it is settled proposition of law that all the

circumstances should be of such nature that conclusive conclusion beyond all reasonable doubts could be drawn but such is not the position in the present case.

9. It was also contended that there was no motive to commit murder of Dilavar Hussain. The prosecution witnesses have admitted that there was no bad-blood between accused-Liyakat and Dilavar Hussain. The accused was 'Navasha' of deceased, who had come from Bhadra to meet him. Thus, no intention or imagination can be gathered to kill Dilavar Hussain but the learned trial court has not taken into consideration this important aspect of the matter in its right perspective.

10. It was also contended that there are contradictions and inconsistencies in the statements of PW-1 to PW-4 and they are not corroborating each other and thus no conclusion can be drawn on their statements. None of the witnesses have seen deceased-Dilavar Hussain and accused-Liyakat Ali sleeping in the room and the accused causing injuries to the deceased. PW-1 Manshoor Ahmed, who is the son-in-law of deceased-Dilavar Hussain has not seen Liyakat Ali going to the room situated on upper storey of house for sleeping. He had only stated that he came from duty in late night at about 12 'O clock and after taking food, he went to sleep. In the

night at about 12:30, he heard noise of vomiting coming from the 'duct' of room which existed in the room where deceased-Dilavar Hussain was sleeping as he was sleeping below that room, but this fact has not been corroborated by other witnesses. PW-3 Kadir Ahmed has stated that he was sleeping directly below the room where Dilavar Hussain was sleeping and there existed a 'duct' in his room. It was stated that it was a winter night and thus, it was not possible for him to hear the noise from that part of the room. Thus, he is not telling correct version before the court and his evidence is not reliable. It was contended that PW-1 Mansoor Ahmed stated that he saw his father-in-law in an injured and unconscious condition and at that time, the backdoor of the house was found open and Liyakat Ali was not there at the scene of occurrence. He admitted in his statement that neither he had seen the accused sleeping there nor he had seen the accused causing injuries to Dilavar Hussain, he had not seen the accused going out of the room. It was urged that the learned trial Judge has placed much reliance on the statement of PW-1, which is not sustainable.

11. It was also contended that PW-2 Nafish Ahmed and PW-3 Kadir Ahmed respectively are the nephew and brother of Sardar Ali with whom accused is having bad blood, thus, their statements are not reliable. It was stated by the learned counsel

that looking to the nature of injuries sustained by deceased-Dilavar Hussain, it was not possible for the injured to state the name of accused. PW-2 Nafish Ahmed has stated that alongwith PW-1 and PW-3 when he reached to the room of Dilavar Hussain (who was sleeping on the upper storey of the house), he saw him in unconscious condition and naming accused 'Liyakat-Liyakat' but in cross-examination he has stated that the deceased spoke only once 'Liyakat' but contrary to that, PW-3 Kadir Ahmed has stated that the deceased spoke the name of accused three times. Thus, the version of PW-2 and PW-3 are not corroborating each other and are not supported by PW-1. PW-1 Mashroor Ahmed has stated that when he saw Dilavar Hussain for the first time, he was lying seriously injured and unconscious. Thus, the statements of PW-2 and PW-3 are not believable and no inference can be drawn. Likewise, statements of PW-4 and PW-5 are also not corroborating the prosecution story. It was contended that the learned trial court committed great error in relying on the statement of these witnesses.

12. Learned counsel for the appellant has also urged that the incident is of night intervening 21/22.12.98 at about 12:45-1:00 a.m. but the FIR of the incident had been lodged after a delay of 10 hours i.e. at about 10:30 a.m. despite the fact that Police

Station is hardly half a kilometer from the place of incidence and the explanation given by first informant that he was busy in treatment, is not sound. Thus, the FIR has been lodged after due deliberation but the learned trial court has not given due consideration to this aspect of the matter.

13. It was also contended that there are contradictions in the statements of witnesses of last seen of accused in the company of deceased. In this respect PW-2 and PW-3 have stated that the deceased and accused went together for sleeping in a room located on upper storey of house, but PW-4 has stated that on the day of occurrence, deceased-Dilavar Hussain went to take sleep at 9:00 p.m. and accused-Liyakat was watching TV till 11:00 p.m. and thereafter he went to take sleep. Thus, there is no corroboration on material point. Thus, the evidence of last seen is not of a conclusive nature and possibility cannot be ruled out that the incident might have happened in some other way but the learned trial Judge has not examined the evidence from all angles.

14. It was also contended that the learned trial court has wrongly relied on the statement of PW-8 Bandu Khan.PW-8 has stated that he did not know accused-Liyakat from before, then could it be possible for him to state the name Liyakat. No identification

parade was done. Further, PW-8 Bandu Khan has admitted that his statement was recorded by police after 15 days of occurrence. Thus, his statement that he saw the accused-appellant was going out from the back-door of complainant's house is not believable. He has also admitted in cross-examination that he was one of the co-accused with the complainant-party in Naya Peer's murder case. Thus, he is an interested witness as well as neighbour of complainant-party and his statement seems to have been concocted afterwards, as such no conclusion can be based on it.

15. It was also contended that the learned trial court has committed grave error in adding the fact of recovery of axle (iron rod) in the chain of circumstances against the accused. It was contended that the recovery of iron axle at the instance of accused is fabricated and concocted one. The recovery was made nearly 8 days after the day of occurrence from the house of complainant and from an open place, that cannot be believed to be made at the instance of accused and from his conscious possession. Further the recovery of iron axle is not supported by the FSL Report (Exhibit-P/20), as no blood stain was found on that. Therefore, the recovery of iron axle is not an incriminating circumstance against the accused. Learned counsel for the appellant further submitted that the prosecution witnesses have admitted in their statements that

there were inimical relation between Sardar Ali and the present accused-appellant Liyakat, and the complainant-party being close relative of Sardar Ali have falsely implicated Liyakat Ali at the instance of Sardar Ali. Thus, these statements are not trustworthy.

16. It was contended that the learned trial court had admitted that there is no direct evidence in the instant case but still conclusion of guilt has been arrived at by the court below against the appellant merely on the basis of assumption and presumption, which is not sustainable.

17. During the course of arguments, learned counsel for the appellant relied upon the following citations :

1. Narain Lal Vs. State of Raj. 1969(3) WLN page 41
2. Prabhoo Vs. State of U.P. [AIR 1962 SC 1113]
3. Inderjeet Singh & Anr. Vs. State of Punjab [AIR 1991 SC 1674]

18. On the above submissions it was urged that the prosecution has not been able to prove the charge levelled against the accused-appellant. It was prayed that the appeal filed by the appellant may be allowed, judgment of conviction and sentence may kindly be set aside and the accused-appellant be acquitted.

19. On the contrary, the learned Public Prosecutor appearing on behalf of State refuted the contentions placed by the learned counsel for the appellant and supported the judgment of learned trial court and stated that it is well established by the prosecution witnesses that accused-Liyakat Ali came from Bhadra on 20.12.1998 and stayed in the complainant's house. Dilavar Hussain was staying in the same house. On the day of occurrence, both accused-Liyakat Ali and deceased-Dilavar Hussain went to sleep in a room situated on upper storey of house and thereafter Dilavar Hussain was found in a seriously injured condition, the back-door of complainant's house was found open and Liyakat Ali was not found there. Thus, the trial court has rightly concluded that it was only the accused who caused injuries to Dilavar Hussain resulting into his death. Learned Public Prosecutor further urged that the recovery of iron axle (Article-I) is at the instance of accused, blood over which has not been detected but that finds support from the medical evidence. The learned Public Prosecutor has also supported the statements of PW-2 and PW-3 that they have stated that the deceased was naming the accused-Liyakat and PW-8 has seen him going out from the backdoor of the house. Thus, all events are supporting the prosecution story. The prosecution witnesses have denied the allegation that at the instance of Sardar Ali they are falsely implicating the accused-appellant. In this way, it was prayed

that the chain of circumstances is well established and on that basis one conclusion has been drawn by the learned trial court that the accused-appellant alone has committed the murder of Dilavar Hussain and that is required to be maintained and the appeal may be disallowed.

20. Before adverting to the contentions raised by the learned counsel for the appellant, it would be just and proper to briefly survey the oral evidence adduced by the prosecution :

21. **PW-1 Mashroor Ahmed** is an important witness. He is the son-in-law of deceased-Dilavar Hussain as well as the first informant. He has stated that on 20.12.1998, accused-appellant Liyakat came to his house and stayed there. Further he has said that on 21.12.1998 he came from his duty at about 12' O clock in the night and after taking food, he slept. At about 12:30 in the night, he heard noise of vomiting coming from the room situated on the upper storey of his house. He went there and saw that his father-in-law (Dilavar Hussain) had sustained head injury and blood was oozing out. At that time, accused-appellant Liyakat was not there and the backdoor of the house was found open. He has further stated that thereafter he took his father and other brother with him and again went to that room and then took the injured-

Dilavar Hussain to P.B.M. Hospital, Bikaner at 12:45 a.m. He also stated that he lodged FIR (Exhibit-P/1) in hospital. During treatment, his father-in-law expired. During investigation, police prepared site plan(Exhibit-P/2), Haalat Moka (Exhibit-P/3), Fard Surat Haal Lash (Exhibit-P/4) and Panchayatnama (Exhibit-P/5). The documents bear his signatures from A to B. He also stated that the police recovered and sealed on the spot the blood-smeared 'rajai', pillow cover etc. from the bed of deceased (Exhibit-P/6) and also the 'rajai' lying on the bed of accused-Liyakat vide (Exhibit-P/7). In cross-examination, he has stated that his father and other brothers were living in the same house and there are 5-6 rooms on the ground floor and two rooms on the super storey. He further stated that he heard the noise of vomiting through the 'duct' (outlet kept in room for passing of air) in his room, which was situated below the room in which Dilavar Hussain was sleeping. He has further admitted in his cross-examination that accused-Liyakat is the son-in-law of Sardar Ali and that Liyakat was not having good relations with Sardar Ali. In cross-examination, he has admitted that there was no bad blood between the accused and the deceased but the relation between the accused and Sardar Ali were not cordial. He has denied the suggestion that at the instance of Sardar Ali a false case has been lodged. PW-1 has admitted that Sardar Ali is the real brother of his father.

22. **PW-2 Nafish Ahmed and PW-3 Peer Kadir** are the brother and father respectively of PW-1 Mashroor Ahmed. **PW-2 Nafish Ahmed** has stated that Dilavar Hussain is the father-in-law of PW-1 and he was staying in their house. Liyakat Ali also came and stayed in their house. On the day of occurrence, accused-Liyakat Ali and Dilavar Hussain took their meal together and thereafter they went to take sleep in a room situated on the upper storey of the house. He has also stated that the accused-Liyakat Ali was the son-in-law of Sardar Ali with whom the relation of accused-appellant was not cordial. He has further stated that at about 12:30 in the night, on the call of his brother Mashroor Ahmed (PW-1) he and his father Kadir Ahmed (PW-3) accompanied PW-1 and went to the room in which Dilavar Hussain was sleeping. They saw Dilavar Hussain was lying in an injured condition. He had sustained 4-5 injuries on his face. Dilavar Hussain was lying in unconscious condition and was calling the name of Liyakat. Thereafter they took Dilavar Hussain to the hospital. In cross-examination, he has also admitted that there was no enmity between the accused and the deceased but the accused was not having cordial relation with his father-in-law i.e. Sardar Ali. He has also admitted that Sardar Ali is his father's real brother. He also denied that at the instance of Sardar Ali he is giving false statement. He has further stated that during investigation recovery of iron axle (rod) was made in his

presence at the instance of accused-Liyakat and the police prepared site plan of recovery (Exhibit-P/9) and recovery memo (Exhibit-P/10) in his presence which bears his signature A to B.

23. **PW-3 Kadir Ahmed** has also given statement on the same line as has been stated by PW-2 Nafish Ahmed. He stated that alongwith his son Mashroor Ahmed and Nafish Ahmed he went to the room in which Dilavar Hussain was lying. He saw him in an injured condition and he was having injuries over his head and near the ear and at that time Dilavar Hussain was calling name of accused-Liyakat. In cross-examination, he has also admitted that 'duct' existed in the room where he was sleeping. He further admitted that there was no enmity between the accused and the deceased. He has also admitted that Sardar Ali is his real brother and Liyakat who is the son-in-law of Sardar Ali was not having good relation with Sardar Ali.

24. **PW-4 Smt. Ruksana** is the daughter of Dilavar Hussain and wife of PW-1 Mashroor Ahmed. She has stated that her father-Dilavar Hussain was staying at his house. Accused-Liyakat Ali came on 20.12.1998 and stayed at his house. She has further stated that on the day of occurrence, after taking meal, his father at 9.00 p.m. went to take sleep in the room situated on the upper storey of

house. Accused-Liyakat was watching TV upto 10.30-11.00 'O clock in the night and thereafter he also went to take sleep on the upper storey of the house. At about 12 'O clock in the night, her husband came from duty and they after taking food slept in their room. At about 12:45 in the night, her husband heard noise of vomiting of her father-Dilavar Hussain, thereupon, her husband went to the room where Dilavar Hussain was sleeping. Her husband took his father and other brother to the room and thereafter her father was taken to hospital. She has also stated that Liyakat was not there at that time but his slipper was lying there in the room. She has stated that her in-laws were having four taxies and the scrap of taxi and other instrument etc., were being kept on the upper storey of the house. She has also stated that there was no inimical relation between her father and accused-Liyakat but during the day time, there was hot exchange of words between Liyakat and the deceased with regard to relation of the accused with his father-in-law Sardar Ali. In cross-examination, she has admitted that there existed no 'duct' in the room in which she and her husband were sleeping and further stated that 'duct' existed in the room in which her father-in-law was sleeping. She has denied that at the instance of Sardar Ali she is giving statement against the accused.

25. **PW-5 Smt. Anwari** is the widow of deceased-Dilavar

Hussain. She has stated that her husband was staying with his daughter-Ruksana (PW-4) and she alongwith her children had gone to Ramgarh (Sikar). She came to know about the facts of incidence only after the death of her husband. She has also stated that there was no inimical relations between the accused-Liyakat and her husband.

26. **PW-6 Hazi and PW-7 Roshan Ali** have not supported the prosecution case and they have been declared hostile. They have retracted from their previous statements (Exhibit-P/11 and P/13) and have stated nothing in support of the prosecution.

27. **PW-8 Bandu Khan** is the immediate neighbour of Mashroor Ahmed (PW-1). He has stated that on the day of occurrence at about 12-12:15 in the night, he came out from his house for the call of nature. At that time, he saw accused-Liyakat Ali going out from the house of Kadir Ahmed. He firstly stated that he was not knowing Liyakat Ali from before, thereafter, he stated that he knows Liyakat. In cross-examination, he has said that his police statement was recorded after 15 days of occurrence. He has also admitted that he was also a co-accused with the complainant-party in 'Naya Peer murder case'. He has admitted in his cross-examination about existence of toilet and bathroom inside his

house.

28. **PW-9 Samim Mohd.** is the witness of Fard. He has stated that the police during investigation recovered 'razai' cover, pillow cover from the bed of deceased vide Exhibit-P/6 and also recovered 'razai' cover lying on the bed of accused-Liyakat vide Exhibit-P/7. Exhibit-P/6 and P/7 were prepared in his presence. Likewise, blood-smeared cloths of deceased were recovered in his presence vide Exhibit-P/8. The site-plan (Exhibit-P/2) was also prepared in his presence. The accused was arrested vide Exhibit-P/12. All these Furds bear his signatures C to D.

29. **PW-10 Dr. P.N. Mathur** is the Medical Jurist who conducted post-mortem. Deceased-Dilavar Hussain expired on 23.12.1998 at 10:45 p.m. He stated that he prepared the post-mortem report (Exhibit-P/14). He stated that he was one of the member of Medical Board (which comprised of two doctors). The deceased sustained multiple injuries which were ante-mortem in nature. As per his opinion, the cause of death is coma due to head injury. The injury no. 1, 2 and 3 were self-sufficient to cause death in the ordinary course of nature. The post-mortem report bears A to B his signatures at two places.

30. **PW-11 Virendra Kumar** was the In-charge Malkhana at the relevant point of time at P.S. Kotwali. He has stated that 22.12.98, 24.12.98, 30.12.98 and 7.1.99 sealed packets relating to this case were handed over to him and the entries thereof were made in the Malkhana Register as Exhibit-P/15 and P/16 and the copies thereof are Exhibit-P/15A and P/16A. He has further stated that the articles remained intact with him.

31. PW-12 Hari Singh is the carrier. He stated that on 3.2.1999 he received in all seven packets from Malkhana for taking to FSL, Jodhpur for analysis. Exhibit-P/17 and P/18 are the receipts thereof. The articles remained intact with him.

32. **PW-13 Mohan Singh** is the SHO and is one of the Investigating Officers of the case. He stated that on 22.12.98 PW-1 Mashroor Ahmed lodged an oral report (Exhibit-P/1) at Police Station and on his report, he commenced the investigation of the case. Accused-Liyakat Ali was arrested by him vide arrest memo (Exhibit-P/12), which bears his signature E to F. The information regarding the weapon of offence i.e. iron axle (rod) is Exhibit-P/19 and the same was recovered vide Exhibit-P/10. In cross-examination he has admitted that the place from where iron axle (rod) was recovered at the instance of the accused was the house of

the complainant-party.

33. **PW-14 Kashi Ram** is the first Investigating Officer. He has stated that during investigation he prepared the site-plan (Exhibit-P/2), recovered and sealed the blood-smeared 'razai' cover, pillow cover and other material from the bed of deceased as well as that of the accused vide Exhibit-P/6 and P/7. He has stated that he recorded the statements of witnesses and after the death of Dilavar Hussain, offence under Section 302 I.P.C. was substituted in place of Section 307 I.P.C. Fard Surat Haal Lash (Exhibit-P/4), Panchayatnama Laash (Exhibit-P/5) and Blood smeared clothes of deceased were collected vide Furd(Exhibit-P/8) were prepared by him. As per the investigation conducted by him, there was no previous inimical terms between the accused and the deceased but the accused was having inimical relations with his father-in-law Sardar Ali. He has also stated that Sardar Ali and Kadir Ahmed (PW-3) are both real brothers.

34. We have also considered the statement of DW-1 Gulam Gilani, who has stated that when the incident took place, at that time, accused-appellant was residing at Bhadra and the police arrested him from Bhadra.

35. We have considered the rival contentions placed by the learned counsel for the accused-appellant and perused the finding and conclusions drawn by the learned trial court. It is revealed from the material available on record, as discussed above, that there is no direct evidence against the accused-appellant, the case of the prosecution is based on circumstantial evidence. The learned trial court in its judgment has mainly relied over the following circumstances, on which the finding of conviction has been concluded :-

1. On the day of occurrence, the accused-appellant and the deceased both were staying in the house of complainant party and they went together for taking sleep to a room situated on the upper storey of the house.
2. The deceased was found in seriously injured condition and at that time accused-Liyakat was found missing.
3. The back-door of the house which was closed during night, was found open after the incident.
4. The deceased was calling the name of accused.
5. On the day of occurrence, there was hot exchange of words between the deceased and the accused.
6. The accused was seen going out by PW-8 Bandu Khan from the back-door of complainant's house in the night at about

12-12:15 a.m. on the day of occurrence.

7. The recovery of iron axle (rod) was made at the instance of the accused.
8. All injuries were by one article.

So far death of Dilavar Hussain is concerned, looking to the statements of witnesses and the post-mortem report (Exhibit-P/14), the cause of death has been shown as head injury. PW-10 has stated that the injuries No. 1, 2 and 3 were sufficient to cause death. Thus, his death was homicidal and that has not been disputed by the accused-appellant and the finding of the learned trial court to that extent is maintained.

Now first of all, we will discuss each of the circumstances on the basis of the material available on record. The first and foremost circumstance stated by the prosecution witnesses PW-1 to PW-4 is that the deceased was staying in the house of complainant for the last four months and the cause of stay as stated by the witness is that he was having inimical relation with Sardar Ali and his family members. His wife (PW-5) and children were residing at Ramgarh (Sikar) but PW-1 to PW-4 are not saying that there was any bad-blood or old enmity between the accused and the deceased. The accused was 'Nawasa' (daughter's son) of deceased

and thus was the close relative of the complainant-party. As stated by prosecution witnesses, he used to come to their house earlier. Thus, the presence of both accused and deceased is not abnormal although the accused has denied his presence in his statement recorded under Section 313 Cr. P.C. and DW-1 Gulam Gilani has also been produced, who has stated that the accused-appellant was at Bhadra in those days but looking to the statement of PW-1 to PW-4, the defence version is not acceptable. In the instant case the presence of accused in itself is not an incriminating circumstance against the accused. With regard to the second aspect that at night after taking food together, they went to the room to sleep. There are contradiction in the statements of the witnesses. PW-1 Mashroor Ahmed was not present at that time when they proceed for sleeping. PW-2 and PW-3 are saying that the accused and deceased went together in the room but PW-4 is stating that her father (deceased) went at 9 p.m. for taking rest and the accused-Liyakat was watching TV upto 11 p.m. and thereafter he went to the room. None of the witnesses have stated that they saw both the accused and the deceased sleeping in the room. Thus, the second part of the circumstance that both deceased and the accused went together to the room is not proved. The learned trial court has ignored the statement of PW-4 Smt. Ruksana in this respect.

36. It was stated by the prosecution witnesses, namely, PW-1, PW-2 and PW-3 that when they reached in the room, Dilavar Hussain was lying in an injured and unconscious condition but no witness stated that the accused-appellant caused injuries to the deceased. The second limb of the circumstance that accused-Liyakat was missing at that time, solely on this count no inference can be drawn that he left the house after causing injuries to Dilavar Hussain. The prosecution witnesses have specifically stated that there was no bad-blood between accused and Dilavar Hussain. In her statement, PW-4 Smt. Ruksana has stated that there was exchange of talk in day time over the issue that Dilavar Hussain had asked accused-Liyakat that why he had given beating to his father-in-law. No other witness is corroborating the same. In our opinion, this itself cannot be a cause for causing such injuries. Thus, mere absence of Liyakat from the house on that day cannot be linked with the commission of crime. Likewise, from the prosecution side it has not been established and proved that the backdoor of the house was closed before sleeping. PW-1 Mashroor Ahmed has stated that when he reached the house at 12 'O clock in the night, the main gate of the house was found open and all the persons in the house were sleeping. The relevant portions of the statement of PW-1 Mashroor Ahmed are quoted hereunder :

" मैं उस रात को बारह बजे अपने घर आ गया था। मेरे घर का मुख्य दरवाजा उस समय खुला ही था। कभी मुख्य दरवाजा बन्द मिलता हैं और कभी खुला मिलता हैं।..... मैं जब रात को डयूटी से आया था उस समय मेरे घर वाले नीन्द मे ही सो रहे थे।"

Thus, this circumstance alone is not sufficient to draw any adverse inference.

37. We have also considered the circumstance that the deceased spoke the name of accused before PW-2 and PW-3 when they visited the room but that is not corroborated by PW-1, who first of all visited the room and saw his father-in-law in seriously injured and unconscious condition. He also stated the number of injuries over the head and ear and stated that blood was oozing from that. Looking to the position of the injured, as stated by the prosecution witnesses that the injured was in a very critical condition and he was not in a position to name the accused, if he would have named the accused, then PW-1 would also have stated the same as he too was present at that time with them and would have also mentioned in the FIR. Secondly in this respect there is contradiction in the statement of PW-2 and PW-3. One is saying he spoke one time and the second one is saying that he spoke two or three times. Thus, in this respect the statement of PW-2 and PW-3 are not reliable and this circumstance is not proved beyond all

doubts.

38. We have also considered the other circumstance the learned trial court has relied over the statement of PW-8 Bandu Khan, who has stated that he saw the accused going out from the house of complainant-party. He has stated that when police came on the site, he was there and narrated the facts but in his court statement he has first stated that he did not know Liyakat and later on he stated that he knows Liyakat. No identification parade has been conducted. As per his statement, his police statement was recorded after 15 days. PW-8 Bandu Khan is the neighbour of the complainant party. He has remained co-accused in the murder case alongwith the complainant party as stated by him. Thus, much reliance cannot be given on this statement. Likewise, the circumstance of recovery of iron axle (rod) at the instance of accused is not trustworthy because firstly it is not supported by the FSL Report (Exhibit-20) as no blood was found thereon and secondly, it was recovered from an open place and that too from the house of complainant-party after near about 8 days of occurrence. Thus, that does not inspire confidence and this cannot be taken as an incriminating circumstance against the accused. We have seen the post-mortem report (Exhibit-14) and the statement of PW-10 Dr. P.N. Mathur. The doctor has stated that the injuries shown in

the injury report came by one object but as per his statement, he has seen only stitched wound. The prosecution has not placed the first doctor who treated and had seen the injured in a wounded position. Thus, this is also not a strong circumstance on which any inference can be based.

39. Apart from these circumstances, it is most significant that the prosecution side has admitted that there was no previous enmity between the accused and the deceased. Question remained unsolved why accused will cause such bodily injury to Dilavar Hussain resulting to death especially when he is in relation 'Nawasa' of the deceased and came to meet him. The Investigating Officer PW-14 Kashi Ram has also stated that from his investigation, he found that there was no enmity between the accused and the deceased. In this case the FIR has also been lodged after 10 hours of the occurrence and the explanation which has been given by the first informant is not satisfactory, that also creates a doubt in the prosecution story. It is well established rule of law that suspicion howsoever may be strong, that cannot take place of legal proof. The finding of guilt cannot be based on suspicion. The prosecution has not been able to prove the charge levelled against the appellant beyond all reasonable doubt.

40. The authorities cited by the counsel for the appellant are

also helpful and support the conclusion drawn by us. In the case of Narain Lal Vs. State of Rajasthan (supra), the Hon`ble Apex Court held that the circumstances should be of such a nature which clinch the accused's guilt beyond any room for doubt. In case of Inderjeet & Ors. Vs. State of Punjab (supra), it was held that in case of circumstantial evidence, if no direct evidence is there to connect the accused with the crime and no enmity between the accused and the deceased, the sole circumstance that the deceased was last seen in company of accused is not sufficient to convict the accused. Similarly, in the case of Prabhoo Vs. State of U.P. (supra), it was held that complete evidence with regard to recovery is required.

41. On the basis of the aforesaid discussion, we are of the view that the conclusion drawn by the learned trial court is not based on sound reasonings and is not sustainable and that deserves to be set aside.

In the result, the appeal is allowed. The judgment under appeal is set aside. The accused is acquitted of the charge. He shall be released forthwith, if not needed in connection with any other case.

(MANAK MOHTA), J. **(N.N. MATHUR), J.**

Sanjay/-